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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 111

MAX SCHAFFER AND NORMAN SCHAFFER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 122

HYMAN KARP AND BENJAMIN T. MARCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. A1-A16)[1] is not yet reported.

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[1] "Pet." refers to the petition for writ of certiorari of Max and Norman Schaffer. "R." refers to the record, which is in four volumes. "Tr." refers to the typewritten transcript.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1959. A petition for rehearing was denied on May 18, 1959 (Pet. A18). The petition for a writ of certiorari in No. 111 was filed on June 11, 1959, and the petition in No. 122 was filed on June 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in continuing the trial of the petitioners under the substantive counts of the indictment after the conspiracy count had been dismissed.

2. Whether it was properly determined that the stolen property had an aggregate value of more than $5,000.

3. Whether the United States Attorney improperly answered a defense argument relating to the nonproduction of witnesses equally available to both sides.

STATUTES AND RULE INVOLVED

18 U.S.C. 2314 provides, in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2311 provides, in pertinent part:

> As used in this chapter:
>
> * * * *
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

Rule 8(b), F. R. Crim. P. provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

The petitioners were convicted in the District Court for the Southern District of New York on charges of transporting in interstate commerce goods known to have been stolen, having a value of more than $5,000. The two Schaffers and Karp received sentences of two years imprisonment and a fine of $10,000. Marco was sentenced to four years imprisonment and a fine of $10,000 (II-R, 69a). The Court of Appeals affirmed (Pet. App. B).

The indictment was in four counts. The first count alleged that, during a period from May 15, 1953, to July 27, 1953, Max and Norman Schaffer, together with Anthony, Mario and Dorothy Stracuzza, knowingly transported stolen goods, consisting

of ladies' and children's wearing apparel, in interstate commerce from the Southern District of New York to Lebanon, Pennsylvania. The second count made similar allegations as to petitioner Marco as to shipments from New York to Bluefield, West Virginia, beginning in June, 1953. The third count related to shipments to petitioner Karp in Fall River, Massachusetts, beginning May 21, 1953. The fourth count alleged conspiracy among the above named parties to transport such goods in interstate commerce (II-R. 5a-7a).

There was also an indictment alleging a conspiracy of the same parties to buy, receive and have in their possession stolen merchandise of the kinds above described (II-R. 8a-9a). The two cases were tried together, but at the conclusion of the government's case both conspiracy charges were dismissed (II-R. 11a).

Anthony and Mario Stracuzza pleaded guilty but had not been sentenced at the time of trial. Dorothy Stracuzza was granted a severance and the charges against her were dismissed after the trial (I-R. 12a-14a).

Since the sufficiency of the evidence to support the convictions is not in issue, we shall review the facts only insofar as is necessary for a discussion of the issues before the Court. Anthony Stracuzza was the principal government witness. In 1952 various truck drivers would bring in quantities of loose dresses and other apparel to the offices of Eisenberg and Berk, and later of Berk alone, where he worked. Anthony Stracuzza would change the tags on the merchandise and

make deliveries to different customers in the garment area. At various times he saw all the petitioners at the place of business where this operation was taking place, examining the merchandise and the accompanying manufacturers' invoices (Tr. 337-346). On one occasion, he saw Karp there with the two Schaffers (Tr. 347).[2] The Schaffers, sometimes one or the other, sometimes both, would come in every week or ten days (Tr. 368-369). Karp came in three or four times (Tr. 370).

In March, 1953, Anthony Stracuzza, assisted by his brother Mario, opened up his own place of business (Tr. 378-379). He successfully solicited the business of some of the former customers of Berk and Eisenberg, including the petitioners. He sold to the Schaffers at 65% of the manufacturer's invoice price, to Marco at 60% and to Karp at 55% (Tr. 395-399, 389-392). When forwarding merchandise to them, Anthony Stracuzza would enclose the manufacturer's invoice, which was the basis for the price to be paid, after obliterating or cutting out the name of the original consignee and the numbers at the bottom of the invoice (Tr. 402, 405-406). Anthony Stracuzza identified records and checks showing his transactions with the various petitioners (Tr. 408, 450-457). The transactions with Stracuzza form the basis of the indictment.

It was stipulated that the aggregate value of merchandise shipped to each petitioner exceeded $5,000, but that each individual shipment was of a value less than $5,000 (Tr. 1424, II-R. 21a).

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[2] An F.B.I. agent testified to a conversation with Karp in which the latter told about Berk introducing him to the two Schaffers (Tr. 1153).

ARGUMENT

1. The fact that the conspiracy count was dismissed at the close of the government's case did not prevent the continuation of the trial on the substantive counts of the indictment.[3] The petitioners' argument that the conspiracy count was included in the indictment as a stratagem for the purpose of permitting an improper joinder (Pet. 11) is unwarranted. The evidence here presented the difficult problem of a conspiracy at the center (between the Stracuzzas) radiating in its dealings into separate spokes (represented by the petitioners). Since there was some evidence that the petitioners knew each other, the United States Attorney could well have believed that all the petitioners were part of a general scheme to deal in stolen goods.

Even though the trial judge found that one conspiracy had not been proved, he was fully justified in his conclusion, after the government's evidence was in, that the substantive case against each petitioner could, without prejudice to him, properly be submitted to the jury. This case does not present the problem of

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[3] The petitioners contend that the trial court should have granted a severance when the conspiracy count was dismissed (Pet. 12). The only motion for a severance was made by the petitioner Karp before the trial, claiming that prejudice would result from the fact that co-defendant Anthony Stracuzza had pleaded guilty to a separate indictment and co-defendant Marco had a criminal record. This motion was denied, *United States* v. *Stracuzza*, 158 F. Supp. 522 (S.D. N.Y.). The defense motions at the close of the government's case were motions to dismiss (II-R. 11a). See *Kleven* v. *United States*, 240 F. 2d 270 (C. A. 8).

Delli Paoli v. *United States*, 352 U.S. 232, where an inculpatory statement of one defendant was admitted as against him, although it implicated another defendant as well. Here no "mental gymnastic" was necessary in order for the jury to follow the court's instructions to consider the evidence separately as to each defendant. The evidence as to each was clearly defined in its presentation and could hardly confuse the jury. There is no reason to assume that the jury disregarded the clear instructions of the court.

2. The statutory requirement that the stolen goods should have a minimum value of $5,000, value being defined as "the aggregate value of all goods * * * referred to in a single indictment",[4] was satisfied by the stipulation during the trial as to each of the petitioners, that "the aggregate value of the merchandise * * * which was transported * * * during the period * * * was in excess of $5000" (II-R. 21a; Tr. 1424).

The trial judge expressed doubts as to what the interpretation should be if an attempt were made to aggregate shipments to various individuals in order to make up the $5,000 (II-R. 16a), but no such problem is here presented, the stipulation being that more than $5,000 worth of merchandise was shipped to each individual petitioner.[5]

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[4] 18 U.S.C. 2314 and 2311.

[5] Actual value of the shipments to the various petitioners, according to the calculation of the Court of Appeals, totaled $19,531.52 to the Schaffers, $17,175.24 to Karp and $23,080.14 to Marco (Pet. App. A-5).

The petitioners contend that a question should have been submitted to the jury whether the shipments to each petitioner were made as part of a single plan or agreement, as a prerequisite to aggregating the value of such shipments for jurisdictional purposes (Pet. 15). No such qualification is written in the statute, which provides that "the aggregate value of all goods * * * referred to in a single indictment shall constitute the value thereof." Of course, if several shipments relate to wholly unconnected schemes, an indictment combining such unrelated charges might be open to attack on a charge of duplicity or misjoinder. But no such attack was here made, although each of the substantive counts showed on its face that it covered shipments over a considerable period of time.

A consideration of the legislative history of the act shows that Congress contemplated that shipments which could be charged in one count or one indictment should be treated in the aggregate. The original "National Stolen Property Act" (48 Stat. 794), enacted in 1934, provided:

> *Sec. 5.* In the event that a defendant is charged in the same indictment with two or more violations of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof.

The purpose of requiring that the stolen property should be of a value of at least $5,000 was stated in House Report No. 1462 (73rd Cong. 2d Sess.):

> * * * There is added a provision which authorizes federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.
>
> It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

In 1939, the statute was broadened to include embezzled property. House Report No. 422 (76th Cong., 1st Sess.) made the following comment as to the value requirement:

> It is to be noted, in this connection, that under the terms of section 5 of the act in the event the defendant is charged with a series of violations, the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation.

From these materials, it is apparent that there is no merit in the contention that the value of the shipments to each petitioner could not be aggregated. Indeed, even on the petitioners' theory that the shipments had to be pursuant to an initial agreement, no real problem is presented by the record in this case, for the evidence upon which the petitioners were found guilty admitted of no other possible interpretation. The shipments were made pursuant to previous agreements with the various peti-

tioners at a fixed discount from the price shown on the manufacturer's invoices.

3. One of defense counsel during the course of his summation commented on the failure of the government to call as witnesses Dorothy Stracuzza and Mario Stracuzza (I-R. 3a).[6] The court overruled a government objection to this argument and defense counsel spent considerable time on this point (I-R. 3a-6a). The United States Attorney answered this argument by pointing out that Dorothy was still a defendant. As to Mario, the government counsel said that he could have offered nothing additional because "if you will recall from the testimony of Agent Miller, both Stracuzzas were interviewed on each and every occasion by him, their story, their testimony, if you will, given to the F.B.I., was a joint story * * *" (I-R. 10a). He then quoted from an inscription in the Department of Justice building to the effect that the government wins when justice is done. He told the jury that, if they believed that the government had concealed the full truth, they should acquit the defendants (I-R. 11a).

There was no impropriety in this argument. There was no attempt on the part of the United States Attorney, as suggested, to indicate that he had knowledge of the case which went beyond the evidence introduced; his statements were based on facts of record and the testimony of the F.B.I. agent. Nor

[6] During the course of the trial the United States Attorney stated that he did not intend to call Mario Stracuzza as a witness and offered to give defense counsel his address (Tr. 1159).

was there any attempt to place his own integrity in the balance. It was an appropriate and restrained answer to a defense argument of doubtful propriety.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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